

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
CITY OF SAN DIEGO)	File No. 0000655923
)	
Request for Waiver of Section 101.147 of the)	
Commission's Rules)	

ORDER

Adopted: April 23, 2002

Released: May 1, 2002

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On November 13, 2001, the City of San Diego (San Diego) filed a request for waiver of Section 101.147 of the Commission's Rules¹ to permit authorization on a primary basis in the 17.7-19.7 GHz band (18 GHz band) Fixed Microwave Service (FMS) of a new station to replace FMS Station WJY47, San Diego, California.² San Diego also seeks authorization to operate in the 6 GHz band. San Diego inadvertently allowed the license for Station WJY47 to expire on October 31, 2000. For the reasons discussed below, we deny San Diego's Waiver Request.

II. BACKGROUND

2. The Commission has reallocated portions of the 18 GHz band from terrestrial fixed services (FS), including the FMS, to satellite services.³ To this end, the Commission has adopted certain transition rules.⁴ In doing so, the Commission balanced the needs of incumbent FS licensees to continue operating their systems with the need to conserve vacant 18 GHz spectrum for use by satellite licensees, to provide satellite licensees with the flexibility to establish new services in a timely and economic manner, and to preclude satellite licensees from bearing any unwarranted additional costs in relocating FS licensees.⁵ Thus, rather than immediately clearing the entire 18 GHz band of the incumbent FS users, the

¹ 47 C.F.R. § 101.147.

² See FCC File No. 0000655923, Attachment 1 (Request for Waiver of Section 101.147 of the Commission's Rules) (filed Nov. 13, 2001) (Waiver Request).

³ See Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3 -17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use, *Report and Order*, IB Docket No. 98-172, 15 FCC Rcd 13430 (2000) (*18 GHz Report and Order*). The satellite services operating in the 18 GHz band consist of both the Fixed Satellite Service (FSS) and the Mobile Satellite Service (MSS).

⁴ See 47 C.F.R. §§ 101.83-101.97. The rules are intended to protect the incumbent FS and FMS licensees in the 18 GHz band "to the maximum extent possible while at the same time providing for the growth of both satellite and terrestrial services." *18 GHz Report and Order*, 15 FCC Rcd at 13432 ¶ 2; see also *id.* at 13470 ¶ 82 (noting that the adopted rules should lead to efficient relocation and thereby serve the public interest).

⁵ See *18 GHz Report and Order*, 15 FCC Rcd at 13460-70 ¶¶ 61-84.

Commission permits the incumbents to continue to occupy portions of the band on a co-primary basis with the FSS and MSS licensees for a significant length of time, by the end of which the incumbents are to relocate to other spectrum.⁶ FSS and MSS licensees have the option, however, of requiring the FS and FMS incumbents to relocate sooner if they pay the additional costs caused by the earlier relocation.⁷ In addition, we authorize extensions and major modifications of existing FS systems only on a secondary basis to FSS and MSS systems.⁸ Most minor modifications of FS stations are also authorized on a secondary basis unless the licensee can demonstrate that it needs primary status and that the modifications will not add to the relocation costs to be paid by the FSS or MSS licensees.⁹ The result is that while incumbent FS licensees are able to continue operating their systems with primary status – as those systems currently exist – any expansions and most modifications to the systems result in secondary status. Also, no new FS licenses will be granted in the 18.58-19.3 GHz portion of the 18 GHz band.¹⁰

3. At the time that the Commission adopted and released the *18 GHz Report and Order*, San Diego was an incumbent licensee operating Station WJY47 on a primary basis. Station WJY47 was authorized for paths on frequencies 1975 MHz, 1985 MHz, 6735 MHz, 6755 MHz, and 19015 MHz. San Diego's authorization to operate Station WJY47 was scheduled to expire on October 31, 2000. As a courtesy, the Commission mailed a renewal reminder to San Diego on August 6, 2000. However, San Diego failed to file a timely renewal application. As a result, the license for Station WJY47 expired on October 31, 2000. San Diego filed the instant application and waiver request on November 13, 2001. The new application seeks authorization to operate on frequencies 6735 MHz, 6755 MHz, and 19015 MHz. The Waiver Request merely states that San Diego seeks a waiver of Section 101.147(r) of the Commission's Rules "to retain 'primary' status for this application. This site was previously licensed under FCC call sign WJY47, which we mistakenly allowed to expire."¹¹

III. DISCUSSION

4. Pursuant to Section 1.925 of the Commission's Rules, we may grant a waiver if it is

⁶ See 47 C.F.R. §§ 101.85, 101.95; see also *18 GHz Report and Order*, 15 FCC Rcd at 13460-67 ¶¶ 61-75. With the exception of incumbent licensees in the 19.26-19.3 GHz band, FS and FMS licensees have until June 8, 2010 – ten years from the adoption of the *18 GHz Report and Order*. See *18 GHz Report and Order*, 15 FCC Rcd at 13462-65 ¶¶ 65-72. Incumbent FS and FMS licensees in the 19.26-19.3 have until October 31, 2011. See Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use, *First Order on Reconsideration*, IB Docket No. 98-172, 16 FCC Rcd 19808, 19820-19821 ¶ 25 (2001) (*18 GHz Reconsideration Order*).

⁷ See 47 C.F.R. §§ 101.85(a), 101.89-101.99.

⁸ See 47 C.F.R. §§ 101.83, 101.97. Secondary operations may not cause interference to operations authorized on a primary basis and are not protected from interference from primary operations. Thus, an incumbent operating under a secondary authorization must cease operations if it causes interference to an FSS or MSS licensee.

⁹ See 47 C.F.R. § 101.97; see also *18 GHz Report and Order*, 15 FCC Rcd at 13460-70 ¶¶ 61-84.

¹⁰ See 47 C.F.R. § 101.147(r).

¹¹ Waiver Request at 1. In full, the Waiver Request totals three sentences. The third sentence notes that expired Station WJY47 "talks" with FMS Station WNEO793, San Diego, California. *Id.* The license for Station WNEO793 is due to expire November 9, 2008.

shown that either (1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹² For the reasons discussed below, we deny San Diego's requested waiver of Section 101.147(r) of the Commission's Rules.

5. Based on the record before us, San Diego has not met its burden of demonstrating that grant of a waiver is warranted under the circumstances presented. The Commission's Rules clearly state that "requests for waiver must contain a complete explanation as to why the waiver is desired."¹³ In this matter, San Diego only states that it seeks a waiver of Section 101.47(r) because it "mistakenly allowed" its license to expire.¹⁴ However, a licensee's inadvertent failure to renew its license in a timely manner is not a unique or unusual circumstance¹⁵ that would render application of the rule in question inequitable, unduly burdensome, or contrary to the public interest.¹⁶ Rather, it is the responsibility of the licensee to know the term of its license and to file a timely application to renew its authorization prior to expiration.¹⁷ Consequently, we believe that San Diego's failure to file a timely renewal application for Station WJY47 does not provide a sufficient basis for granting a waiver of Section 101.147(r) of the Commission's Rules.

IV. CONCLUSION

6. For the reasons discussed above, we deny San Diego's request for waiver of Section 101.147(r) of the Commission's Rules. San Diego failed to make a sufficient showing that grant of a waiver is warranted under the circumstances presented. Absent a waiver, Section 101.147(r) of the Commission's Rules precludes the authorization of a new Part 101 license in the 18.58-19.3 GHz band. Therefore, San Diego's application is defective with respect to frequency 19015 MHz. The application

¹² 47 C.F.R. § 1.925(b)(3).

¹³ 47 C.F.R. § 1.925(b)(2); *see also, e.g.*, Teton Communications, Inc., *Order*, 17 FCC Rcd 410, 411-12 ¶ 5 (WTB PSPWD 2002); World Learning, Inc., *Order*, 15 FCC Rcd 23871 (WTB PSPWD 2000) (denying a waiver request filed thirty-four days after the expiration of the license because, in part, the licensee "failed to provide any information in support thereof").

¹⁴ Waiver Request at 1. San Diego filed the instant application and waiver request more than one year after the expiration of the license.

¹⁵ The presence of unique or unusual circumstances is a prerequisite to relief under the second prong of the Commission's waiver standard. 47 C.F.R. § 1.925(b)(3)(ii); *see also, e.g.*, Fresno City and County Housing Authorities, *Order on Reconsideration*, 15 FCC Rcd 10998 (WTB PSPWD 2000). With regard to the first prong of the Commission's waiver standard, 47 C.F.R. § 1.925(b)(3)(i), San Diego intimates no suggestion that the underlying purpose of the rule in question would be frustrated or otherwise not served by its application in this matter. *See* Waiver Request at 1.

¹⁶ *See, e.g.*, Sierra Pacific Power Company, *Order*, 16 FCC Rcd 188 (WTB PSPWD 2001); First National Bank of Berryville, *Order*, 15 FCC Rcd 19693 (WTB PSPWD 2000); Sierra-Plumas Rural Electric Cooperative, *Order*, 15 FCC Rcd 5572 (WTB PSPWD 2000); Duke Power Company, *Order*, 14 FCC Rcd 19431 (WTB PSPWD 1999).

¹⁷ *See* 47 C.F.R. § 1.949; Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order on Reconsideration*, Docket No. 98-20, 14 FCC Rcd 11476 (1999).

will be processed with respect to the 6 GHz paths.

V. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.925 and 101.147 of the Commission's Rules, 47 C.F.R. §§ 1.925, 101.147, the Request for Waiver of Section 101.147 of the Commission's Rules filed by the City of San Diego on November 13, 2001 IS DENIED.

8. IT IS FURTHER ORDERED that the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch SHALL PROCESS the City of San Diego's pending application, FCC File No. 0000655923, in accordance with this *Order* and the applicable Commission Rules.

9. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau